No. 13051

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON BRIDGE COMPANY,
Appellant,

vs.

TUG "LEW RUSSELL, SR.," and CRANE BARGE No. 25, RUSSELL FAMILY, INC., RUSSELL TOWBOAT AND MOORAGE COMPANY,
Appellees.

BRIEF OF APPELLEES CRANE BARGE No. 25 and her owner, RUSSELL FAMILY, INC.

Upon Appeal from the District Court of the United States for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND 11-51

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Appellees.

BRIEF OF APPELLEES CRANE BARGE No. 25 and her owner, RUSSELL FAMILY, INC.

Upon Appeal from the District Court of the United States for the District of Oregon.

This brief is on behalf of Appellees CRANE BARGE NO. 25 and her owner, RUSSELL FAMILY, INC., an Oregon corporation.

These Appellees urge that this Court affirm the judgment of the District Court for the District of Oregon, and particularly that part of which requires Appellant (owner of bridge) to pay to Appellee, RUSSELL

FAMILY, INC., (owner of Crane Bargo No. 25) damages in undisputed amount of $3,306.11 sustained to Crane Barge No. 25 when it collided with the bridge.

In interest of avoiding repitition these Appellees will stress the negligence of Appellant in operating its bridge and leave its co-appellees, Tug Lew Russell, Sr., and Russell Towboat and Moorage Company, through their able Proctor to answer other points raised by Appellant in its opening brief.

OPINION OF THE DISTRICT COURT

The oral opinion of Hon. Gus J. Solomon, Judge of the United States District Court for the District of Oregon, rendered from the bench in this cause is as follows: (40)*.

> "I do not find any negligence on the part of either the tug or the barge, and I find that the bridge was negligent in not maintaining an auxiliary whistle or some other signaling device not dependent upon the bridge's power lines which could have been used in the event of a power failure or other emergency.
>
> "The failure of the tug to signal the bridge to open the draw does not constitute negligence because the undisputed evidence shows that the bridge tender saw the tug and proceeded to raise the span when the tug was more than one-quarter mile from the bridge. The span was raised 13½ feet and then stopped.
>
> "When the span was raised to that height, the tug proceeded slowly, believing that the span was high

*Numerals in parenthesis refer to page numbers of printed Apostles on Appeal.

enough for it to proceed through it with safety. I find that the tug had the right to assume that the span was raised high enough and that it therefore had the right to proceed.

"I do not find that the bridge was negligent by reason of the fact that a power failure prevented it from raising the span higher, but I do find that it was negligent for failing to provide an auxiliary signal, not dependent upon its power supply, so that an oncoming vessel could have been warned in the event of a power failure or other emergency which rendered it dangerous for a ship to proceed. While it is true that the span had always opened without difficulty in the past, power failures had occurred on several occasions and an ordinary prudent bridge-owner could have reasonably anticipated that a power failure could have occurred during the lifting of its movable span.

"The bridge tender's attempt to signal the oncoming tow by waving his hat, while standing on the up-river side of the bridge next to the pilot house behind some steel girders, is commendable but, in the absence of having attracted the attention of the tow personnel, does not relieve the bridge-owner of its obligation to maintain an adequate auxiliary signal, nor does it make the tow negligent for its failure to observe such hand signal. The presence of a small red reflector which was unilluminated in broad daylight in the middle of the lift span did not constitute a warning to the tow, particularly when the evidence showed that the reflector, even when illuminated, did not turn green except when the span was raised to its full height and that the span had been so raised on only a few occasions during all of its years of operation.

"Russell Towboat and Moorage Co., respondent and claimant of the Tug 'Lew Russell, Sr.,' is entitled to a judgment for costs against the Libelant, and Russell Family, Inc., claimant of the Crane Barge No. 25, is entitled to a judgment on its counterclaim against libelant for its damages in the sum of $3,306.11, and for its costs."

Bridge which raises span to permit tug and tow to pass through is presumed negligent if span insufficiently raised.

When a bridge, as in the case at bar, raises its lift span and brings it to rest to permit a tug and her tow to proceed thereunder, such is not only an invitation for the tug and her tow to pass through but also a representation (if not a signal) that the tug and her tow can proceed under the span with safety.

A case with facts identical to those in the case at bar is *The Louie Rugge* (2nd Cir., 1917), 239 F. 458, where a tug and lighter below a draw bridge blew for the bridge to open and then waited until the bridge got up before proceeding at half speed to go under the opened draw. The bridge gave no reply signal and the tug assumed the draw was raised sufficiently high when it wasn't. The mast of the lighter struck the draw. The Court held that the open draw was an invitation for the tug and lighter to proceed under and that the bridge was prima facie negligent. The Court said:

> "The Libelant's one witness as to negligence, testified in substance that he was the captain of the lighter, that he saw the bridge and its lights; that the tug blew for the bridge and waited 'until the bridge got up . . . and then started to go ahead again' at half speed, indicating the angle at which the bridge opened and how the mast of the lighter struck. While the appellant makes the argument from this testimony that the tug went under the bridge when it was still ascending, we think the testimony conclusively shows that the bridge had risen and had stopped before the tug proceeded, and that this amounted to an invita-

tion to the tug to come on, and prima facie shows negligence of those operating the bridge."

See also:

The Kard (D.C.E.D. Tenn., 1940), 38 F. (2d) 844.

In the case at bar the bridge tender had actual notice twelve hours before that the tug and her tow were to pass under the bridge and that the lift span would be required to be raised (100). When the tug and tow arrived below the bridge the following occurred according to the tug "pilot", witness SADEWASSER (228):

"Q. Now as you approached the bridge, what did you do in regard to the progress of your boat forward?

A. When we were approximately within a quarter of a mile of the bridge I stopped both engines, let them shut down until the bridge came to a stop. It started raising, and he came to a stop. I assumed that it was high enough and started the engines and proceded at an idling speed to the bridge."

Idling speed was between a mile and a mile and a half per hour (229). The tug and tow was bucking a five mile per hour current in the river (230). No signals were given by either the tug (89) nor the bridge (105).

Counsel for Appellant contends that *The Louie Rugge* and *The Kard* cases are not in point because in each case the vessel blew a whistle for the bridge to open. Such is an immaterial distinction. The purpose of a vessel signalling a bridge is to get the bridge open. In the case at bar the bridge tender raised the lift span without waiting for the tug to blow a whistle (288). It had previous actual notice that a crane barge required the bridge to open (100). For the tug to blow a whistle after the span

raised would have been a useless, unnecessary and abnormal act. A whistle signal from the tug was not intended as inquiry for affirmative whistle signal from the bridge for permission to pass under. This is clear from the regulation requiring the vessel to whistle and not requiring the bridge to reply (201). *The Louise Rugge* and *The Kard* cases are sharply in point with the case at bar and clearly establish that the bridge was prima facie negligent in opening the span to an insufficient height and not effectively warning the tug and her tow of the danger.

Burden of "Inevitable Accident" is upon Appellant which burden it has failed to sustain.

Appellant in answer to Appellees' cross libel pleaded the excuse that the bridge span was not sufficiently raised because of a power failure on part of a Public Utility District in the State of Washington which furnished the bridge's electric power (29). Such affirmative defense is as much as saying that the proximate cause of the damage was an "inevitable accident".

The burden of proving "inevitable accident" is heavily upon the party asserting such defense and is not to be lightly arrived at.

The Anna C. Minch (2d Cir., 1921), 271 F. 192.

The Bayonne (2nd Cir., 1914), 213 F. 216.

Palmer v. City of New York (D.C.S.D.N.Y., 1942), 43 F. Supp. 43.

In the case at bar the electric power which operated the lift span as well as the whistle on the bridge failed

when the bridge span was raised 13½ feet, a point less than three feet short of being high enough to clear the boom on Crane Barge No. 25 (231).

There had been previous power failures on the bridge. Bridge electrician BENSON testified (136):

"Q. Well, do you know whether they had experienced any power failures before this?

"A. Not during lift operation. There have been other power failures (81).

"Q. That affected the bridge?

"A. Not during the operation of the bridge.

"Q. Well, what were those other power failures? What did they affect, the lights, or what?

"A. Power and lights both.

"Q. Well, they have had other instances than when the bridge was without any power; is that correct?

"A. That's right.

"Q. How many of those do you know of?

"A. Two times that I can remember.

"Q. How many?

"A. Two times that I can remember.

"Q. Over what period of time?

"A. Well, as soon as it was noticed by the bridge tender, he called me, and I went up.

"Q. Excuse me, I didn't mean that. I mean was it over a period of six months or a year or what?

"A. Oh, a year, I would say a year and a half."

Also, CHANDLER, Appellant's President and Engineer, testified that fuses had blown on the bridge occasionally and that, though unusual, the main source of power "does fail on occasions just like lights go out here in a thunderstorm" (206).

The amazing testimony is, however, that in spite of previous power failures, fuses blowing, etc., Appellant's

President and Engineer CHANDLER never contemplated what should be done in an emergency such as brought about this litigation. He testified (205):

> "Q. Before this accident did you ever give any contemplation or thought as to what would happen if the power went out such as when this accident occurred? Did you ever reflect in your mind what should be done in such an emergency before this accident?
>
> "A. Well, no, I never contemplated this kind of an accident. If I did, the bridge would have been designed like a battleship to take that kind of a thrust, and it wasn't."

Prior to this collision the bridge tender had never been given any instruction as to what to do in event of power failure (109) nor was there a horn, flag or any other type of signal device whatsoever in the bridge control tower (105) except the bridge whistle, which operated directly from electric power (249).

A draw bridge over a navigable channel is every bit as much a navigable instrument as is a vessel. The operation of a bridge requires the same degree of prudence and awareness of liklihood of collision as does a ship at sea when approaching another ship. A prudent bridge operator should anticipate emergencies and make predetermined plans of action to meet such anticipated emergencies just as does a prudent deck officer on the bridge of a ship underway.

This cardinal rule requiring a watch officer to anticipate emergency was set forth by the eminent navigator and naval officer, Arthur A. Ageton in his book, *Naval Officer Guide,* at page 256. Ageton's notes to Junior

Officers standing deck watches underway open with the following:

> "1. When coming on watch, *visualize the proper action to be taken* in case an enemy submarine, aircraft, torpedo, or surface ship is reported or seen, *or what you are required to do* in case of man overboard, or sighting at night a ship without lights, close aboard, or sighting a mine or suspicious object in the water, *or other emergency.*" (Italics added.)

It was not only negligence in itself for Appellant, knowing of previous power failures and knowing of the possibility of such failures occuring at critical times, not to provide means of avoiding such danger or warning vessels in such emergencies, but it also shows that the affirmative defense of "inevitable accident" cannot be satisfied as a matter of law by merely showing that the only electric power supply failed at the wrong time.

In the case of *Colonial Nav. Co. v. United States* (D.C.E.D.N.Y., 1926), 14 F. (2d) 480, a submarine was navigating upon the surface through Hell Gate and an accident occurred when "dynamic break contacts" fused and stuck together in the electrical circuit controlling the steering gear. The submarine, which had carefully inspected its electrical circuits before the maneuver, pleaded "inevitable accident" as a defense. The Court in denying such defense on the ground that the accident could have been avoided if the hand steering apparatus was used said:

> "That danger from the electric steering gear was considered at least not unlikely appears from the precautions taken by the commander of the 0-7, before entering Hell Gate, as appears by his testimony; but the results show that all that could be accom-

plished thereby would be to reduce the injury inflicted, not to avoid it, whereas all danger from the defective steering gear, while passing through Hell Gate and New York Harbor, could have been avoided, and the accident prevented, by using the hand steering gear or the motor instead of the engines.

"The defense of inevitable accident has not been sustained. *The Merchant Prince,* 1892, Prob. Div. 179, Asp. Mar. Cas., Vol. 7, N.S. p. 208; *The Lackawanna,* 210 F. 262, 127 C.C.A. 80; *Australia Transit Co. v. Lehigh Valley Transp. Co.* (C.C.A.), 235 F. 53; *The City of Camden* (C.C.A.), 292 F. 93; *The Edmund Moran,* 180 F. 700, 104 C.C.A. 552; *The Enterprise* (D.C.), 228 F. 131; *The J. Rich Steers,* 228 F. 319, 142 C.C.A. 611; *Hawgood & Avery Transit Co. v. Meaford Transp. Co.,* 232 F. 564, 146 C.C.A. 522. The 0-7 is solely responsible for the resulting damage."

Even more in point is another submarine case, *The Submarine R-19, King Coal Co. v. U. S. A.* (U. S. Dist. Ct. N.D. Cal., Feb. 25, 1924), reported in 1924 A. M. C. 698, where a submarine on the surface in San Francisco Bay was unable to avoid colliding with a moored barge because a fuse blew out in the electrical circuit of the steering apparatus. In denying the defense of "inevitable accident" the Court said:

"As fuses commonly blow out, the accident could have been anticipated and avoided and was, therefore. not inevitable."

Although the parties to *Australia Transit Co. v. Lehigh Valley Transport Co.* (6 Cir., 1916), 235 F. 53, did not raise the question of lack of emergency steering gear the Court was quick to observe it would be negligence in not having one. In that case the defense of "inevitable accident" was pleaded by one vessel in collision with an-

other because the steam steering gear became fouled. The Court in denying defense of "inevitable accident" observed at page 54:

> "In addition to both these theories, it is to be observed that there was an interval of at least three minutes (The Bethlehem claims about twice as much) after it was known that the steering engine was disabled and before the collision. *It would seem that the boat might well have been provided with an alternative or emergency steering gear, which could have been put into use within much less time;* but this has not been argued as a ground of fault, and we do not depend upon it." (Italics added.)

Ordinary care required Appellant's bridge to have some form of a non-electrical signal device just as does a submarine or ship to have standby steering gear; particularly when the principal signal system was dependent upon electricity.

Collision could have been avoided if bridge had any non-electrical signal device to warn tug and her tow of danger.

Had Appellant any kind of an effective signal device in the bridge control tower to warn an approaching vessel of danger the collision could have been entirely avoided.

From a quarter mile down stream, after the bridge span had been raised and after it had come to a stop the tug and her tow proceeded against a five-mile current at idling speed—not more than one and one-half miles per hour (229). The tug's engines could be put in reverse within two or three seconds (223). The tug and her tow

was approximately 265 feet in length (232). It could have been stopped within a distance of half the tow's length (233). This means the tug and her tow could have been prevented from striking the bridge at any time before reaching a point 133 feet from the bridge span.

At the time the bridge tender and electrician first became aware of the power failure ADAMS, the bridge tender, says the tug and her tow were 600 feet from the bridge (102); BENSON, the bridge electrician, says 600 to 900 feet (125); SADEWASSER, the tug pilot, says a quarter mile or about 1500 feet (228).

Assuming nautical miles instead of land miles for arithmetical simplicity, the tug and tow approaching the bridge at one and one-half knots was advancing toward the unknown danger at the rate of 150 feet per minute. Allowing 150 feet (or one minute) for the tug and tow to stop after warning, if ADAMS' estimate of the situation is correct there was at least three minutes within which the bridge could warn the tug and her tow of the danger; if BENSON is right there was five minutes; and if SADEWASSER is right there was nine minutes.

Respondent's witness STACKHOUSE, Supervisor of Bridges and Ferries for Multnomah County, Oregon, testified that the four draw bridges in Multnomah County had whistles operated by compressed air pumped into a storage tank by electrical means which enabled the whistles to operate even with a power failure (219). He also testified that the bridges under his supervision frequently experienced power failures (224). He further testified that the bridges in Multnomah County all had in addition to air whistles a loud speaker box or horn not dependent

upon electrical power which could be used in emergencies to talk to approaching vessels (224). This witness expressed his opinion that the air whistles as used on the Multnomah County bridges were of the type customarily used upon bridges on the Columbia river (220).

From the foregoing it becomes crystal clear that Appellant was negligent and that it utterly failed to sustain its affirmative defense of "inevitable accident". Previous to this collision it knew of power failures; knew of no signalling devices whatsoever being in the bridge control tower, except an electrically driven whistle; made no move whatsoever to anticipate what would happen in event of a power failure during the raising of the span; and made no attempt to provide any kind of an auxiliary signal system to warn off an approaching vessel in an emergency, such as confronted it in the case at bar.

Appellant must have known, and if not, could have easily ascertained how other draw bridges in the region handled this problem. The fact that other bridges have anticipated power failures and have provided non-electrical auxiliary devices to signal vessels even with air whistles not geared to the electricity merely emphasizes the negligence and indifference of Appellant to marine disaster. It was negligence to leave bridge tender ADAMS with no means of meeting the emergency, but to go to the upstream edge of the control tower and frantically wave his hat through bridge obstructions in a vain and ineffective attempt to warn off a tug and her tow approaching from the downstream side of the bridge.

It is equally clear that Appellant has failed to sustain its burden of proving its affirmative defense of "inevit-

able accident", a terrific burden at best, when it is apparent that the accident was one that could have easily been avoided by anticipating an ordinary occurrence. Knowledge of liklihood of power failure should be chargeable to anyone using electric power brought in over wires from a distance. It is particularly chargeable to Appellant, which had power failures on the bridge previous to the instant accident.

Decisions cited by Appellant in its brief either support Appellees or are not in point with the case at bar.

These Appellees feel compelled to distinguish several decisions cited by Appellant in support of its position, that the bridge was free from negligence. It also contends that several of the decisions cited by Appellant really support Appellee's contention.

On page 17 of its brief Appellant cites *Newton Creek Towing Co. v. City of New York,* 49 F. (2d) 475, which held that a bridge was not negligent in failing to anticipate that a "key" on a shaft which turned gears that raised the bridge span would break. The significant fact in that case was that it was a libel by an excursion steamer which lost business because it could not go through the bridge while same was being repaired. It was not a libel where a vessel, attempting to pass under the bridge at the time of the accident, could not or did not get a signal of danger. Of course, a bridge cannot anticipate that a piece of its machinery might without cause break. However, a bridge can very well anticipate that a power failure

might occur during the lifting of a span and while not being able to do anything about it, at least make provision to warn a vessel approaching such unknown danger. That case is nowise in point.

The case of *Cement v. Metropolitan West Side El. Ry. Co.,* 123 F. 271, which at page 18 of its brief Appellant asks this Court NOT to follow is truly a case in point with the one at bar. It should be followed and Appellees appreciate Appellant calling it to Appellees' attention. That is a case where, as a vessel approached a bridge, for some unexplained reason the bridge tender could not open the bridge. The Court in holding the bridge negligent in not providing a method of warning the approaching vessel of the danger, said at page 274:

> "And again, when the bridge tender found that the bridge would not open—and that was when the vessel was 150 feet north of Jackson street bridge and at least 300 feet away—in view of the situation we think it was the duty of the respondent to provide, and of the bridge tender to give, some sort of warning signal that would timely notify the vessel of the difficulty and of the danger that was imminent, of which she could not otherwise be informed."

In this last cited case the vessel had signalled for the bridge to open and was approaching in anticipation of its opening. In the case at bar the bridge had already opened, but not high enough, and the tug and barge being invited to pass under did so without being warned of the danger which the bridge tender knew and the tug master did not.

The case of *City of Chicago v. Wisconsin S.S. Co.,* 97 F. 107, was cited by Appellant at page 18 of its brief,

claiming it to be in point with the case at bar. It isn't. That was a case where a steamship passed through a turn bridge—the center span having been opened and held in the open position by a lock at one end fastened to the center protection structure of the bridge. The Court found that a fender or some obstruction on the forward part of the steamship struck the opened turn span at one end, breaking the lock that held the span in place and causing the after end of the turn span to strike the same steamship near her stern. The Court held that the bridge was not negligent because the object of the lock was to hold the span in place, not to have it withstand collision by the vessel passing through. The Court said, at page 110:

> "The object of the lock is merely to hold the bridge in position over the center protection, and not to resist the impact of a moving vessel."

Such situation is radically different from the case at bar, where these appellees contend that Appellant should anticipate power failures and provide for warning vessels in event of power failures—not asking that a piece of machinery designed for one purpose be expected to be responsible for quite another.

Another case requiring comment is that of *Conners Marine Co. v. New York and Long Branch R. Co.*, 87 F. Supp. 132, cited by Appellant for the proposition that when a vessel strikes a draw bridge it is presumed that the vessel is negligent. Of course, when a vessel strikes an immovable abutment of a draw bridge the vessel is presumed to be negligent as obviously the abutment can't move. It is not the case of a vessel striking an insuf-

ficiently raised span of a draw bridge. The most significant thing in that case is that after the Court found the tug and her tow negligent due to faulty navigation which caused it to collide with the abutment and not the span of the draw bridge it went on to find the bridge negligent in delaying to raise the span and in not warning the tug and tow of inability to promptly open its span. The Court said at page 135:

> "The failure to signal and the delay in opening the draw resulted in placing the tug in a dangerous position. Thus, having created a situation in which there was the risk of collision, the negligence of the bridge personnel must be held to have concurred with the imprudent navigation of the tug in causing the collision."

Nor is *Texas & P. Ry. Co. v. Angola Transfer Co.*, 18 F. (2d) 18, analogous to the case at bar. In that case a pier of the bridge which was known to the vessel passing through the bridge, was submerged during an abnormal high water and the vessel struck a sharp edge of the pier causing the damage. The Court absolved the bridge of negligence in saying it was not required to anticipate the high water that submerged the pier nor to put a fender on the pier to prevent its sharp edge from damaging a vessel that had no occasion to strike the pier in the first place.

CONCLUSION

The record supports the finding that Appellee RUSSELL FAMILY, INC. was damaged to extent of cost of repair and loss of use to CRANE BARGE NO. 25 (273-274). The items of damage were not disputed at time of trial and is not now questioned by Appellant on appeal.

In view of the present record the evidence supports the findings of the trial court and the findings with appropriate law support the judgment requiring Appellant to pay to Appellee RUSSELL FAMILY, INC. $3,306.11 for damage resulting to Crane Barge No. 25 by negligence of Appellant in

(1) Raising the bridge span to an insufficient height and inviting the tug with her tow to go through without any warning of danger which the bridge tender knew and the tug did not know;

(2) Failure by Appellant to meet its burden of proving that the damage sustained by Crane Barge No. 25 resulted from an "inevitable accident";

(3) Knowing of previous power failures; that the only warning device on the bridge was an electrically controlled whistle; and failing to act as a prudent bridge operator should act by either having a whistle that was not dependant upon power or having some other non-electrical auxiliary device to warn an approaching vessel of danger created by a power failure.

WHEREFORE these Appellees pray that the judgment of the lower court be affirmed and that Appellee RUSSELL FAMILY, INC. upon its cross libel in personam against Appellant recover $3,306.11 damages together with costs and interest from date of judgment.

Respectfully submitted,

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CRANE BARGE NO. 25 and her
owner RUSSELL FAMILY, INC.